

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

68-0157 (9-06) - 3091078 - EI

ARIANA R KIRKBRIDE
Claimant

APPEAL NO. 11A-UI-08246-HT

**ADMINISTRATIVE LAW JUDGE
DECISION**

HEARTLAND HEALTH MANAGEMENT
Employer

**OC: 05/15/11
Claimant: Respondent (2-R)**

Section 96.5(2)a – Discharge

STATEMENT OF THE CASE:

The employer, Heartland Health Management (HHM), filed an appeal from a decision dated June 10, 2011, reference 01. The decision allowed benefits to the claimant, Ariana Kirkbride. After due notice was issued, a hearing was held by telephone conference call on July 27 2011. The claimant participated on her own behalf. The employer participated by Administrator Sheila Matheney, DON Lisa Dahne, MDS Coordinator Carrie Crull, and Activity Director Teresa Damron.

ISSUE:

The issue is whether the claimant was discharged for misconduct sufficient to warrant a denial of unemployment benefits.

FINDINGS OF FACT:

Ariana Kirkbride was employed by HHM from September 9, 2010 until May 19, 2011 as a part-time activity assistant. She received disciplinary action ranging from a verbal warning to a three-day suspension for various rule violations, such as failing to follow the proper notification procedure when she was going to be absent and not following the instructions of her supervisor, Activity Director Teresa Damron, when the supervisor was not in the facility. She had been advised her job was in jeopardy.

Ms. Damron was on vacation on May 12, 2011, when the claimant left at 11:00 a.m., just before a major activity was to begin. She notified a nurse she was leaving but did not have permission from her supervisor. The employer then had to quickly find other staff members to conduct the activity because of Ms. Kirkbride's unapproved absence, disrupting the duties of other staff.

On May 18, 2011, she was to be conducting a "reminiscence" session with residents where she was to read aloud to them and discuss and interact with them about their past memories. Administrator Matheney was by the activity room where she personally observed the claimant for about three minutes only reading to herself and not reading aloud or talking with the residents. She was next door for 10 or 15 minutes and did not hear any conversation or reading aloud from the claimant. Other staff members had seen the claimant reading to herself during

this scheduled activity in the past and one had even asked her if she was reading for herself or the residents.

On May 19, 2011, the claimant was scheduled in the day room at 4:00 p.m. to play Jeopardy with the residents. Ms. Matheney observed her just reading a newspaper and occasionally talking with the residents. After the claimant left the room, the administrator talked with some of the alert and oriented residents, who asked her if they were going to be able to play Jeopardy or not. The policy is that if even one of the residents wants to play a scheduled activity, then it must be played. If no one wants to play the scheduled activity, then another approved activity may be substituted. When questioned by the employer, the claimant maintained no one wanted to play Jeopardy so she was "playing music and having conversation" with the residents. This is an approved activity, but she was not playing any music at that time.

Ms. Matheney questioned the claimant about these matters and discharged her for another incident of failing to perform her scheduled duties as instructed by her supervisor.

Ariana Kirkbride has received unemployment benefits since filing a claim with an effective date of May 15, 2011.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code section 96.5-2-a provides:

An individual shall be disqualified for benefits:

2. Discharge for misconduct. If the department finds that the individual has been discharged for misconduct in connection with the individual's employment:

a. The individual shall be disqualified for benefits until the individual has worked in and has been paid wages for insured work equal to ten times the individual's weekly benefit amount, provided the individual is otherwise eligible.

871 IAC 24.32(1)a provides:

Discharge for misconduct.

(1) Definition.

a. "Misconduct" is defined as a deliberate act or omission by a worker which constitutes a material breach of the duties and obligations arising out of such worker's contract of employment. Misconduct as the term is used in the disqualification provision as being limited to conduct evincing such willful or wanton disregard of an employer's interest as is found in deliberate violation or disregard of standards of behavior which the employer has the right to expect of employees, or in carelessness or negligence of such degree of recurrence as to manifest equal culpability, wrongful intent or evil design, or to show an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to the employer. On the other hand mere inefficiency, unsatisfactory conduct, failure in good performance as the result of inability or incapacity, inadvertencies or ordinary negligence in isolated instances, or good faith errors in judgment or discretion are not to be deemed misconduct within the meaning of the statute.

The claimant had been advised her job was in jeopardy as a result of her failure to follow the employer's policies, procedures, and supervisor instructions. In spite of the warnings, the claimant continued to "cut corners" by not doing the scheduled activities, choosing instead to read to herself while passing it off as "interacting" with the residents or not substituting another approved activity. The employer has the obligation to provide necessary care, which includes physical and mental stimulation for the residents. The claimant's conduct interfered with its ability to do so. This is a violation of the duties and responsibilities the employer has the right to expect of an employee and conduct not in the best interests of the employer. The claimant is disqualified.

Iowa Code section 96.3-7, as amended in 2008, provides:

7. Recovery of overpayment of benefits.

a. If an individual receives benefits for which the individual is subsequently determined to be ineligible, even though the individual acts in good faith and is not otherwise at fault, the benefits shall be recovered. The department in its discretion may recover the overpayment of benefits either by having a sum equal to the overpayment deducted from any future benefits payable to the individual or by having the individual pay to the department a sum equal to the overpayment.

b. (1) If the department determines that an overpayment has been made, the charge for the overpayment against the employer's account shall be removed and the account shall be credited with an amount equal to the overpayment from the unemployment compensation trust fund and this credit shall include both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5. However, provided the benefits were not received as the result of fraud or willful misrepresentation by the individual, benefits shall not be recovered from an individual if the employer did not participate in the initial determination to award benefits pursuant to section 96.6, subsection 2, and an overpayment occurred because of a subsequent reversal on appeal regarding the issue of the individual's separation from employment. The employer shall not be charged with the benefits.

(2) An accounting firm, agent, unemployment insurance accounting firm, or other entity that represents an employer in unemployment claim matters and demonstrates a continuous pattern of failing to participate in the initial determinations to award benefits, as determined and defined by rule by the department, shall be denied permission by the department to represent any employers in unemployment insurance matters. This subparagraph does not apply to attorneys or counselors admitted to practice in the courts of this state pursuant to section 602.10101.

The claimant has received unemployment benefits to which she is not entitled. The question of whether the claimant must repay these benefits is remanded to the UIS division.

DECISION:

The representative's decision of June 10, 2011, reference 01, is reversed. Ariana Kirkbride is disqualified and benefits are withheld until she has earned ten times her weekly benefit amount, provided she is otherwise eligible. The issue of whether the claimant must repay the unemployment benefits is remanded to UIS division for determination.

Bonny G. Hendricksmeier
Administrative Law Judge

Decision Dated and Mailed

bgh/kjw